No. 2733

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY C. CUTTING,

Appellant,

vs.

HENRY J. WOODWARD, FRANCIS A. WOODWARD and THE MONETARY TRUST COMPANY (a corporation),

Appellees.

APPELLANT'S REPLY BRIEF.

JACOB M. BLAKE,
Solicitor for Appellant.

Filed this.....day of April, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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APPELLANT'S REPLY BRIEF.

The appellant does not contend that this is an appeal from an interlocutory order granting or refusing an injunction, or appointing a receiver, under the provisions of Sec. 129 of the Judicial Code, but an appeal from a final judgment upon a separate, distinct and severable issue made by the pleadings as to the ownership of the 1175 shares of Land Company stock, the attempted sale of which by the Trust Company to its president, Mr. Cutting, the Court found to be fraudulent and void and by which *no title or right of property was vested in him,* and, as a result of which *no title or right of property* accrued to him in any income,

dividends, or benefits derived therefrom. We further claim that the second paragraph of the decree directing an accounting as to such income, etc., etc., is an order merely in execution of the final decree, adjudging *the title to the stock* to be in The Monetary Trust Company, and that as the decree now stands it is self-executing, being nothing less than a decree quieting the title to the stock in the Trust Company.

Thompson v. Dean, 7 Wall. 342,
Railroad v. Bradleys, 7 Wall. 577.

The decree upon this serverable issue is as follows:

> "It is Ordered, Adjudged and Decreed that the contract purporting to have been entered into on or about December 20, 1906, between certain members of the board of directors of the defendant, The Monetary Trust Company, and the defendant Henry C. Cutting, which purports to transfer 1,175 shares of the capital stock of the Point Richmond Canal and Land Company, a California corporation, from the defendant The Monetary Trust Company to the defendant, Henry C. Cutting, was and is fraudulent and void, and vested no title to said shares of stock in said Cutting, but said shares of stock still remain the property of The Monetary Trust Company, and the latter is entitled to have said shares restored to its name upon the books of said Point Richmond Canal and Land Company.
>
> "It is Further Ordered, Adjudged and Decreed that the defendant Henry C. Cutting has no title or right of property in or to the income, profits, dividends, or benefits of any character received by, or derived to the benefit of, said defendant from

> or on account of said 1,175 shares of the capital stock of the said Point Richmond Canal and Land Company since the said attempted transfer thereof to said defendant, or while the same has stood in his name; and the plaintiffs, on behalf of said Monetary Trust Company, are entitled to have an accounting from the defendant of all such profits, dividends, or benefits, if any, which have been received or derived by, to, or for the benefit of said defendant from said stock."

Our petition for an appeal is from the decree of October 6, 1915, "and from each and every severable part thereof:" and the order allowing the appeal is in the same terms (Trans. pp. 242 and 249).

The rule determining the finality of a decree in such a case is laid down in the leading case of Forgay v. Conrad, 6 How. 201 at p. 204, and many times reaffirmed by the Supreme Court of the United States. It is as follows:

> "When the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such a decree carried immediately into execution, the decree must be considered as a final one to that extent, and authorizes an appeal to the Court, *although so much of the bill is retained* in the Circuit Court as is necessary for the purpose of adjusting by a further decree, the accounts between the parties pursuant to the decree passed."

In Thompson v. Dean, 7 Wall. 342, the decree directed the defendant to transfer to the plaintiff certain shares of stock, and that an account be taken as to the amount paid for the same and the dividends accrued. The Court said:

> "In this case the decree directs the performance of a specific act and requires it to be done forthwith. The effect of the act when done *is to invest the* transferees with all the rights of ownership. It changes the property in the stock as absolutely and as completely as could be done by execution on a decree for sale. It looks to no further modification or change of the decree. No such change was possible after the term, except on re-hearing or bill of review in the Circuit Court, or through appeal in this court." (Italics are ours).

In the case at bar there was no specific act required to be done on the part of the defendant Cutting, for the Court summarily decreed *the title and right of property to be in The Monetary Trust Company.*

We desire to call the Court's attention in this connection to the fact that the trial Court treated the decree as final and entertained and disposed of a petition for a re-hearing within the term in which the decree was entered. The failure to grant such re-hearing upon the ground of accident, surprise and of newly discovered evidence is assigned and urged in this Court, as error.

In Thompson v. Dean, the Court concludes:

> "The decree for which it was taken decided the right to the property in contest, directed

> it to be delivered by defendant to complainant by transfer, entitled the complainant to have it carried immediately into execution, leaving only to be adjusted accounts between the parties in pursuance of the decree settling the question of ownership." (p. 346).

In Winthrop Iron Co. v. Meeker, 109 U. S. 180, the bill sought to set aside as fraudulent the proceedings of a stockholders' meeting, as here, and to have a receiver appointed. It was decreed that the meeting was fraudulent, that the lease executed in accordance with the authority then given was void, that a receiver should be appointed with power to continue the business, and that an account be taken of the profits realized from the use of the leased property, and from royalties derived from ores mined by the defendant. It was contended that the decree was not final, because it left undetermined the account of profits thus derived. It was held on appeal that the decree was final because the main purpose of the suit had been accomplished, and that the accounting was ordered in aid of the execution.

In Hill v. Chicago & E. R. R. Co., 140 U. S. 52, the Court had before it a suit in equity to compel a transfer to the complainant of certain shares of the capital stock of the defendant railroad company. It was brought against numerous defendants, who were alleged to be interested more or less in the several contracts and transactions out of which the claim of complainant arose. Issues having been joined by the replication to the answer

a decree was made in June, 1885, dismissing the bill for want of equity against certain defendants and denying relief to the complainant "upon all matters and things in controversy," except as to the amount of money paid by the defendant Gondy for right of way in execution of a certain contract. The decree further declared that for the purpose of ascertaining that amount, the case be retained as to other defendants, and be referred to a Master in Chancery to take additional testimony on that subject, and to report the amount paid; the Court also declaring that on the coming in of the report, it would make such further decree as was equitable. Upon a report of the Master, a decree was made in July, 1887, ordering that the defendant railroad company against whom the suit had been retained should pay complainant forthwith the sum of $6513, with interest and costs. On an appeal from this later decree, the appellee railroad company sought to open up the matters that had been determined by the decree in June, 1885, no errors being assigned to the decree of July, 1887. In holding the decree of June, 1885, to have been final, the Court said:

> "It disposed of every matter of contention between the parties, except as to the amount of one item, and referred the case to a Master to ascertain that. It dismissed the bill against several defendants for want of equity, and denied relief to the complainant upon all matters in controversy, except as to that amount, and retained the case only as against the defendants in that matter. The rights and liabili-

ties of all the parties were in other respects determined.

"But there was no adjudication as to the payment of the amount to be ascertained by the Master; that remained unsettled. It was, however, a severable matter from the other subjects of controversy, and did not affect their determination.

"The decree of June 8, 1885, was appealable as to the matter which it fully determined; so also was the decree of July 14, 1887, as to the severable matter which it involved."

At the same term, the Supreme Court in Lewisberg Bank v. Sheffey, 140 U. S. 445, 452, had the same question before it, and stated:

"It is true, as pointed out by Mr. Justice Field in *Hill v. Chicago & Evanston Railway, supra,* that an appeal may be taken from a decree in an equity cause, nothwithstanding, it is merely in execution of a prior decree in the same suit, for the purpose of correcting errors which may have originated in a subsequent proceeding. This was so held in *Chicago & Vincennes Railroad v. Fosdick,* 106 U. S. 47, 83, and was the rule sanctioned in Forgay v. Conrad, 6 How. 201 and Blossom v. Milwaukee & St. Paul Railroad Co., 1 Wall, 655. *An appeal will lie from such decrees according to the nature of the subject matter and the rights of the parties affected."* (Italics are ours).

In this case the Court had occasion to determine from the facts in issue whether an interlocutory decree, making an injunction perpetual against parties attacking a sale under a trust deed and which "directed the fund to be brought into Court for distribution" according to the terms thereof, was final, and it was held that it was; that error

assigned to that decree could not be reviewed upon an appeal from the later decree made upon the distribution of the fund; and that a petition for a re-hearing not filed in the trial Court within the term in which the interlocutory decree was rendered, could not be entertained.

In this case we call attention particularly to the fact that a petition for a re-hearing *within the term* was entertained and disposed of, and that error is assigned and the assignment is strenuously urged upon the order denying it. This, we respectfully submit, makes a record strongly in favor of the Court entertaining this appeal in the interest of a prompt and speedy determination of the questions raised upon the petition; for, if the trial below so far as it has proceeded involves a mistrial upon the merits, the sooner that is disposed of, the sooner the ends of justice will be arrived at. Delay, vexation of, and the pecuniary loss to, the interested parties incident upon unnecessarily protracted litigation, will be greatly minimized by a disposition of this question upon this appeal.

In connection with what are material facts to be considered in the defense of a stockholders' suit of this nature, we request a particularly careful examination of Mr. Justice Peckham's decision in Gamble v. Queen's County Water Co., 123 N. Y. 91; 25 N. E. 201. Counsel for the appellees, the Woodwards, lay stress upon the fact that estoppel is not pleaded. The significance of their ready reliance upon this has a very strong bearing upon

the point made by us at the argument of the petition for the re-hearing that it was not to be expected that Gen. Hart's mind would readily run to the pleading and proof of the defense of estoppel by reason of his intimate relationship, as general counsel, to The Monetary Trust Company, and that his failure to raise the issue was and is, from no possible view of this relationship and the proof made of it at the trial, incompatible with the *honest belief on the part of both himself and Mr. Cutting,* that the transaction of December 20, 1906, was honest, fair and above board. This must be so unless the proof of actual fraud, i. e. fraudulent intent need not be proved as a fact, but may be derived as an implication of law; and this, we respectfully submit, would create a legal solecism. While we again urge, as we did in our opening brief, that in this case where actual fraud and estoppel *in pais* are the gist of the suit, and the charges of fraud, and the acts constituting the estoppel are such as to involve the solicitor in his own defense, and he thereby becomes disabled to try the case, we as strongly deny the imputation that his undertaking to defend the suit upon the ground that a question of constructive fraud alone was involved, raises no presumption in law or ethics that he was guilty of an actually fraudulent conspiracy in company with his client to injure or destroy the legal rights of the complainants. The fact remains, however, that Gen. Hart and Mr. Wernse are to be substantial beneficiaries of any decree declaring the transaction of December 20,

1906, fraudulent and void, that they are charged as director and officer, respectively, with having been under the control and domination of the defendant, Cutting, in spite of that fact. The negation of the latter fact lies in establishing a defense of equitable estoppel against The Monetary Trust Company. The Court below might and, as we think, should have determined, that, due to the peculiar relationship of the parties, Mr. Cutting's defense should as a matter of legal propriety, in which the Court as such is properly and directly concerned,—have been fortified by the defense of estoppel, as urged by counsel who had been substituted in place of Gen. Hart. This is the question that we earnestly submit should be taken cognizance of by this Court on this appeal.

Passing, however, to the question of the finality of a decree for the purposes of an appeal, the question whether a decree is final and appealable is not determined by the name which the Court below gives it, but it is to be decided by the appellate Court on a consideration of the essence of what is done by the decree.

Potter v. Beal, 50 Fed. 860.

Following the decisions in Forgay v. Conrad, Thompson v. Bradleys, and Hill v. Railroad Company, the federal Courts have several times recognized the feature of "severableness" involved in so-called "interlocutory" or preliminary orders, as justifying appeals therefrom.

In Potter v. Beal, supra, the plaintiff, a bank president, whose conduct of banking affairs was under examination by the federal authorities, brought a suit against the receiver of the bank of which he was president, to obtain possession of a trunk alleged to contain private papers. The relief sought was (1) possession of the papers: (2) an injunction against the receiver from using the same before a grand jury; and (3) such other relief as might be just. The United States District Attorney having been allowed to intervene, the Court on a preliminary hearing made an order that the trunk be delivered to a Master to be by him opened and the contents distributed, the private papers not material to the Government's investigation, to the complainant's counsel; those belonging to the bank, and not material to the case of the government, to be delivered to the defendant; those deemed important in behalf of the application of the district attorney to be placed apart and abide the further order of the Court. The Court held that those portions of the order directing delivery of the papers to the complainant and receiver, respectively, were final and appealable.

In Elliot v. Sackett, 108 U. S. 132, where the bill sought the reformation of a deed by which complainant was made to assume the payments of a mortgage on the property, and a cross bill was filed seeking foreclosure of the mortgage, the Court held that a decree dismissing the bill, and directing foreclosure in default of payment was final, so as to give the complainant a right to appeal.

In Terry v. Sharon, 131 U. S. 40, the object of the suit was to procure a decree declaring null an instrument purporting to be a declaration of marriage between complainant and defendant. A final decree was entered by the Court below directing the delivery up and cancellation of the instrument, but the decree was not executed in the lifetime of the complainant, and his executor filed a bill of revivor. The Supreme Court held the order of revivor to be a final decree. Through Mr. Justice Miller, the Court said that upon a bill to revive a wholly unexecuted decree two questions present themselves: First, whether the decree is in such a condition that any further action can be had; and second, whether who asserts the right is entitled to the benefit of the decree, and in this connection the Court said:

> "Both of these questions are matters which interest the defendant in the original decree, and in regard to which he must have a right to a hearing before the circuit court; and the order of the circuit court on that subject is so far final, and may so affect the rights of the defendant, that we think he is entitled to an appeal from such an order, if, in other respects, it is one within the jurisdiction of the Supreme Court. * * * *The order which the Court makes in such a case is so essentially decisive and important that we do not doubt that it is appealable.*" (Italics are ours).

In Trustees v. Greenough, 105 U. S. 527, a bill was filed by a creditor of a trust fund, consisting of large tracts of land which had been illegally disposed of by the trustees, and the burden of the

litigation was borne by the complainant, whose efforts resulted in the appointment of a receiver, and the recovery of large bodies of land, and the realizing of a large sum of money therefrom, inuring to the benefit of numerous other creditors who shared in the distribution. Complainant then filed a petition for orders for the payment of attorney's fees, costs and other expense. These orders were granted and in respect thereto the Court said:

> "They are certainly a final determination of the *particular* matter arising upon the complainant's petition for allowances, and direct the payment out of the fund in the hands of the receiver. *Though incidental to the cause the inquiry was a collateral one, having a distinct and independent character, and received a final decision.* The administration of the fund for the benefit of the bondholders may continue in Court for a long time to come, dividends may be made from time to time in payment of coupons still unsatisfied. The case is a peculiar one, it is true; but, under all the circumstances, we think that the proceedings may be regarded as so far independent as to make the decision substantially a final decree for the purposes of an appeal." (Italics are ours).

In Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207, the decree appealed from was rendered, in railroad foreclosure proceedings, upon an intervening petition claiming certain locomotives. The decree determined the ownership and right of possession of the locomotives, and an appeal was sustained.

To the same effect is the case of Central Trust Company v. Marietta & N. G. R. Co., 48 Fed. 850.

In Chase v. Driver, 92 Fed. 780, complainant was the owner of an equity of redemption in property which had been sold under deeds of trust, and he filed a bill alleging the irregularity of such sales, and praying for a resale, that the purchaser be held a mortgagee in possession, that an account be taken of the amount due on the mortgages and that the surplus proceeds be paid to him. He did not offer to redeem, or question the validity of the mortgage debt. A decree of resale was ordered, and the case referred to a Master. The property was resold and an order made confirming the sale. Subsequently the Master filed his report which was confirmed and an appeal was taken from the order of confirmation. The Court held on this appeal that the former orders of resale and confirmation of sale were final orders which could not be reviewed on an appeal from the order confirming the Master's report.

In Andrews v. National Foundry and Pipe Works, 73 Fed. 516, a creditors' suit had been brought against a corporation and certain of its stockholders, who were also its mortgagees, and a decree was entered which fixed the amounts due both secured and unsecured creditors, and adjudged that certain creditors had been superior to the mortagees; that the corporate property be sold to satisfy the same; that the individual defendants were holding specified amounts of unpaid stock,

and should pay the specified demands of the unsecured creditors. It was held that this decree was final and appealable as to all these provisions.

In Rust v. Waterworks, 70 Fed., 132, the rule as to appeals from final judgments in all the various aspects shown by the foregoing authorities is stated as follows:

> "A final decision, which completely determines the rights in the suit in which it is rendered of some of the parties, who are not claimed to be jointly liable with those against whom the suit is retained, *and a final decision which completely determines a collateral matter,* is subject to review in this Court by appeal or writ of error." (Italics are ours).
>
> Citing Williams v. Morgan, 111 U. S. 684.

See also

Jackson v. Jackson, 175 Fed. 715;
Salmon v. Mills, 66 Fed. 32.

A decree for specific performance, concluding all the rights of the parties, is a final decree, notwithstanding that a conveyance which it directs is to be afterwards presented to the judges for their approval of its form and terms.

See also

Long v. Maxwell, 59 Fed. 948;
Marian Coal Co. v. Peale, 204 Fed. 163;
Montgomery Light, etc., Co. v. Montgomery T., etc., Co., 219 Fed. 977, 978.

As previously stated, we do not contend in support of this appeal that it is to be governed by

section 129 of the Judicial Code; but on the other hand we do contend strenuously that so far as that part of the decree declaring the contract of sale between the appellant Cutting and the appellee The Monetary Trust Company for the transfer of 1175 shares of stock of the Point Richmond Canal and Land Company, entered into on or about December 20, 1906, *fraudulent* and *void,* and that it *vested* no title in the appellant, but that *said shares remain the property* of The Monetary Trust Company, the same is final, and that the accounting ordered in the next paragraph of the decree is in execution merely of a final judgment, under all of the authorities.

In the case of City of Eau Claire v. Payson, 107 Fed. 552, the Court made an order requiring the city to pay a sum to a receiver on account of a disputed claim against it, but made no provision for the return of the money in any case, and this order was held to be appealable though the city's ultimate liability was left for future determination.

> "That the order was appealable there should be no serious doubt. To the extent of the payment required, it was essentially a final decree. It was made without jurisdiction over the party affected, compelled the immediate surrender of a large sum of money, and made no provision for its safe-keeping or return in case a return should be found necessary. It was not ordered into the hands of the receiver to be held for future disposition. If that had been intended, the registry of the Court would have been the appropriate depositary. There was no necessity for the order except to supply the receiver with money to

> be used in the performance of his trust, and that he might so use it seems to have been the purpose of the petition in seeking, and of the Court in entering, the order. If mere custody of the money was intended, it should have been explicitly so stated. The Supreme Court has not placed upon the words 'final decree,' respecting the right of appeal, a strict and technical sense, but has given them a liberal and reasonable construction. Forgay v. Conrad, 6 How. 201, 12 L. Ed. 404; 4 Notes U. S. Rep. 628. See also Potter v. Beal, 2 C. C. A. 60, 5 U. S. App. 49, 50 Fed. 860; Trustees v. Greenough, 105, U. S. 527, 531, 26 L. Ed. 1157; Williams v. Morgan, 111 U. S. 684, 699, 4 Sup. Ct. 638, 28 L. Ed. 559; In re Farmers' Loan & Trust Co., 129 U. S. 206, 9 Sup. Ct. 265, 32 L. Ed. 656; Stovall v. Banks, 10 Wall. 583, 19 L. Ed. 1036."

Many of the authorities, notably Forgay v. Conrad, Potter v. Beale and Trustees v. Greenough, recognize the necessity under which the appellate Court is placed to open the record in order to determine fully the facts which are decisive of the question as whether or not it will promote justice and a speedy determination of issues which have been fully and fairly litigated between the parties, to entertain an appeal in advance of a complete determination of all the issues, and in no case which we have been able to find has the Court refused to entertain an appeal, except where the cause is reserved to a Master judicially to pass upon some undetermined matter *relating to the single issue made by the pleadings* from the decision of which it is sought to prosecute the appeal. *We earnestly request the Court to determine if our statement in*

this particular is not correct. Certainly the case of Craighead v. Wilson relied upon by counsel presented the single issue of a right to a general accounting.

In the case at bar, the complaint is double. Two issues are presented by the pleadings which are *single* and *severable,* they are, first the issue as to the title to the 1175 shares of the stock of the Point Richmond Canal & Land Company; and second, the issue as to the right of The Monetary Trust Company to a general accounting from the defendant, Cutting, as its officer and agent. The accounting directed to the issues and profits of the stock is merely in execution of the final decree declaring *the title to and property in* the stock *to be in The Monetary Trust Company,* and confers only a ministerial duty upon the Master; the general accounting ordered places a judicial duty upon the Master but since a decree made upon a Master's report is appealable *in either case,* it works no hardship upon the appellees here to defend an appeal in this Court from that part of the decree which is unquestionably final.

Counsel in his brief and in the oral argument complained that our statement of facts and argument was confusing because it commingled the law and the facts arising upon these two issues. This is not a fair comment, because we dealt with the *facts* relating to complainants' demand for a general accounting only for the purpose of negativing the charge of actual fraud, i. e., fraudulent intent,

on the part of Mr. Cutting, in connection with the purchase of 1175 shares of stock, by a reference to matters embraced in the other separate, single and distinct issue in the double pleading. It was their constant endeavor below to support the weakness of their case upon the issue of the ownership of the stock, by imputations of fraud entitling them to a general accounting as to other matters, and we have simply met their attack upon the validity of the transaction of December 20, 1906, by opening up fully to this Court every fact in the whole case, upon which fraud or the imputation of fraud on the part of Mr. Cutting, Mr. Wernse or General Hart could be predicated; and we do not think it lies in the mouth of counsel for the complainants below to complain to this Court of our action in the premises.

We feel that we must have convinced the Court of our earnestness to have the Court open the record on this appeal. We are, to say the least, surprised that counsel should insist upon the dismissal of this appeal. Knowing as they must know the grave concern which the prolongation of this litigation must create for those already interested in the affairs of the Point Richmond Canal & Land Company, and for the interests of their own clients, if they should prevail, we feel justified in characterizing any dilatory proceedings, either in this Court or in the Court below, as merciless to a degree. The record shows the bonds of the Land Company to be overdue. The properties of the company involve an immense harbor and townsite

project at Point Richmond, California; a part of the land has been subdivided and has passed into other ownerships. All of Mr. Cutting's efforts to further finance the affairs of the Land Company in the interests of its stockholders and of third persons to whom it has made sales of lots, are necessarily greatly handicapped by a dispute as to the ownership of so large an amount of its stock as one-fourth of its entire issue.

What may be the motive of complainants below in desiring to delay a decision upon issues so vital to their own concern it is not within our view to discern; but, with great deference, we may urge that we are concerned that there should be no miscarriage of justice growing out of a failure of this Court to understand what an early determination of this *severable controversy* means to the appellant, to the Point Richmond Canal & Land Company, and to those of the public who have bought lots in the Point Richmond Canal & Land Company's sub-division upon the faith and credit that the development of its project shall not be seriously interrupted by disputes between the stockholders of the company and that where such dispute arises, its settlement will not be interminably delayed merely through the whim and caprice of the plaintiff litigants.

We are made bold to urge these considerations upon the Court by the uniform practice of Federal Courts in indulging in the most liberal construction of statutes and a free and unrestrained appli-

cation of the rules of law and equity to meet the demands of justice in particular cases. In this connection we wish to call the Court's attention to Rule 26, Equity Rules, relating to joinder of causes of action. It is as follows:

> "The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there is more than one plantiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such cause of action cannot be conveniently disposed of together, the court may order separate trials."

It is not necessary to determine whether the complaint in this action under former rules touching multifariousness, would have been bad upon demurrer. But the former practice of federal Courts may be briefly referred to as explaining the spirit of a broader liberality in regard to when litigants may be entitled to separate records upon a joinder of equitable causes of action.

It has long been the rule that whether a bill is demurrable on the ground of multifariousness or misjoinder of causes of action will depend on the special circumsances, *and what the due administration of justice* requires in each case.

> Sheldon v. Keokuk Northern Packet Line Co., 8 Fed. 769.

The rule has been stated conversely, "that a bill which involves the same indivisible subject matter is not multifarious because of separate claims thereto."

Rumbarger v. Yokum, 174 Fed. 55.

A bill, under the former practice, was subject to demurrer for multifariousness, if one of the two complainants had no standing in court, or where they set up antagonistic causes of action, *or the relief for which they respectively prayed in regard to a portion sought to be reached involved totally distinct questions, requiring* DIFFERENT EVIDENCE AND LEADING TO DIFFERENT DECREES (syllabus in Walker v. Powers, 104 U. S., p. 245). The Court says in this case (page 251):

> "By multifariousness 'is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill,' Story, Eq. Pl. sec. 271. In Daniell's Chancery Practice, 335, it is said in explanation of this that '*it may be that the plaintiffs and defendants are parties to the whole of the transactions which form the subject of the suit, and, nevertheless, those transactions may be so dissimilar that the Court will not allow them to be joined together, but will require distinct records*'." (Italics are ours.)

The test of multifariousness in a bill containing two different causes of suit against the same person must show two things to concur; first, the grounds

of the suit must be different; second, each ground must be sufficient, as stated, to sustain a bill.

Brown v. Guarantee Trust Co., 128 U. S. 403.

A close analysis of the bill in this case will show that in order to sustain that portion of the decree which we claim is final and from which an appeal lies, complainants had to plead and prove a distinct, severable and different cause of equitable suit to determine the title to a particular subject matter, to-wit: 1175 shares of Land Company stock, with reference to the conduct of defendant in connection with a particular transaction which took place on or about the 20th day of December, 1906. The decree declaring the title, and directing an accounting in execution thereof established the complainants' complete right to the peculiar relief appropriate in such cases. The Court will readily see that no relief for a general accounting could be granted in such a case.

The second and separate cause of suit for relief by way of a general accounting grows out of distinct rights of the complainants relating to distinct transactions occuring at different times and based upon different and distinct obligations due from the defendant Cutting to The Monetary Trust Company, i. e., payment of his stock subscription, the failure to complete a contract between himself personally and the Point Richmond Canal and Land Company, in which it was claimed The Monetary Trust Company had a beneficial interest; and his

misapplication, as an officer and director, of the funds of the Trust Company.

It seems to us very clear that the object of joining these distinct causes of suit was for the purpose of confusing the Court upon the trial in reference to the issue of fraudulent intent necessary to be proved in connection with the transaction of December 20, 1906. At any rate, counsel for the appellees, the Woodwards, have had no hesitancy to use their pleading of these remote facts to supply the total absence of proof of actual fraud on the part of Mr. Cutting in connection with the former transaction. It is this action on the part of complainants, with its resultant unfair and inequitable effects not only upon Mr. Cutting as the owner of all the issued capital stock of the Land Company, if his purchase was valid, or of three-quarters thereof, if it was fraudulent, but also upon the mortgagee of the Land Company's property, the purchasers of lots from it, and upon those who bought in the faith of the development of the townsite and harbor project at Point Richmond, that is forcing the issue of a speedy trial of this appeal on the merits of this single and severable cause of suit. Had the objection of multifariousness been sustained by the trial Court, or if not sustained, separate trials had been ordered pursuant to Rule 26, Equity Rules, no question would now be before the Court as to the finality of the decree upon the issue of the title to the 1175 shares of stock (see motion to dismiss, Trans. pp. 24-29). Must the appellant now lose the benefit which would have

accrued to him by having two records, when he has sought throughout to avoid the very condition which counsel for the appellees now argue should operate against a recognition of this part of the decree as final and appealable?

Our answer is that under Rule 26, as we construe it, whenever the demands of justice require it, a bill in equity may be *so* framed, as to require a separate trial of separate issues, when under the former practice it would be bad for multifariousness. Under the provision that "If any such cause(s) of action cannot be conveniently disposed of together the Court may order separate trials," the objection of multifariousness largely disappears. This rule manifestly contemplates the action that may be had in the trial court; but is not the analogy striking when we address ourselves to the application of the same principle and ask a separate trial of this appeal upon the single and severable issue found by the final decree adjuging the title of the 1175 shares of stock to be in The Monetary Trust Company? The rule determining whether or not a bill is multifarious has always been applied with reference to whether or not the joinder of several equitable causes of suit rendered the issue too complex, or resulted in such a confusion as to render the trial of them difficult, inconvenient, or unjust to any of the parties. The more liberal spirit of modern equity practice is to advance the issues to a speedy determination, even if separate trials are necessary. A principle so salutary in its operations, so direct in its response to the demand

for a convenient and speedy administration of justice, should, we respectfully submit, find an appropriate application in appellate procedure.

Counsel for the appellees state that there is no appeal from an order denying a petition for a rehearing; but that is entirely different from the question as it is presented here. The Court will not only review such an order on an appeal from a final decree but will, in the interest of justice on its own motion *reverse the decree*, and remand the case for a re-hearing with directions to permit the taking of further evidence, where the record fails to show facts essential to a proper decision of the case.

Barbour v. Coit, 118 Fed. 272;
Standard Computing Scale Co. v. Computing Scale Co., 145 Fed. 627;
Esto v. Lear, 7 Pet., 130, 131;
Ill. Cent. R. Co. v. Illinois, 146 U. S. 387.

Counsel urge in their brief that the question of estoppel cannot be considered in this appeal, because it is not pleaded in the answer of the defendant Cutting. They also make a point that the answer is a joint and several answer of Mr. Cutting and The Monetary Trust Company, in behalf of proof of the conspiracy of Cutting, Wernse and General Hart to defraud the plaintiffs. Our petition for a re-hearing states as one of its grounds that estoppel against The Monetary Trust Company should have been pleaded, and that the plaintiff was not advised by his then counsel of this defense.

We have asserted repeatedly that it would not be within the right expectation of a judicial mind to assume that this defense would readily occur to General Hart since it would rest upon a consideration of his own conduct as a stockholder and general counsel of the Trust Company since December 20, 1906, and that his failure to make such defense is not to be taken as evidence either of actual fraud on the one hand, or of lack of proper zeal for his client on the other. The whole transaction merely involves one of those unescapable conditions which it is the office of judicial minds and the proper function of Courts to unravel and straighten out in justice to all the parties concerned. We, therefore, again strongly urge the propriety on the part of this Court of taking congnizance of this appeal, if for no other purpose than to determine the questions arising upon the petition for a re-hearing. We have made a diligent search for authorities which would sustain our request upon this particular ground, and are unable to find any; and we must assume that the question is raised for the first time, and we must be content to rest the matter upon broad principles of public policy which have for their object the prompt determination of litigation.

In conclusion it is necessary for us to refer to certain inferences of fraud which the Court is asked to draw from the record as touching the merits of the case.

If it is admitted that a stockholders' suit can not be maintained to set aside a transaction that

is merely constructively fraudulent, then the actual fraud, i. e., the fraudulent intent on the part of the party charged therewith, must synchronize with the transaction complained of, and proof thereof must be clearly and positively made; and, furthermore, it cannot be proved by evidence of fraudulent conduct alleged to have taken place at other times.

United States v. Budd, 144 U. S. 164.

Now, if the Court please, what does all the argument of counsel for the appellees, the Woodwards, about the note of Mr. Cutting being outlawed mean if it is not an attempt to supply the utter lack of proof of actual fraud on the part of Mr. Cutting in the transaction of December 20, 1906? Mr. Cutting gave his check for the stock on that day. It was carried into the books of the company of February 28, 1907, as a cash item (the date when he had issued to him as shown by the stock certificate stub of the Point Richmond Canal & Land Company, all of the issued stock of that company, except qualifying shares to directors, including his own 2350 shares, the 1175 shares of stock bought from Reichert, the 150 shares from Lewis and the 1175 shares from The Monetary Trust Company and some small lots from other sources, making up a certificate for something in excess of 4900 shares), and it was held as a cash item until some time in June, when Mr. Cutting issued his note and took up the check.

Mayo, a director of the company, knew on December 21, 1906, of the intention of The Monetary Trust Company to loan this money back to Cutting. It

is conceded that Wernse, Morgan and Betz, the other directors, who with Cutting, constituted the Board of Directors of the Trust Company, knew of this intention at the same time. Mayo has been a member of the board continuously since the note was given, yet in spite of this, the contention seems to be seriously urged that Mr. Cutting has secretly and silently plotted during four years since the note was made to secure a position whereby he could plead the statute of limitations against this obligation and thus defraud these interests, all represented in the Board of Directors and owning two-thirds of the entire issued capital stock of the Trust Company. And in support of this claim there is not a breath of proof that Mr. Cutting has ever exercised any coercion, adverse pressure, or undue influence over any member of the board, and the only testimony touching the point that the interest of the Woodwards, represented by Mayo on the board, did not receive proper consideration, is the testimony of Mayo as follows:

> "I had absolutely nothing to do with the management of the Monetary Trust Company at the time; I merely attended the meetings to protect the interests of myself and my clients. I had nothing to do with the management and cut no figure in anything that was done. I was not allowed in any of the secret councils of the company. It is hard to say what I know about secret councils; they were all in the office there together, and I noticed whenever I would come into his office there would be a hush, nothing said. My presence always caused silence." (Trans. p. 176).

The Court is seriously asked to consider conduct, which could not be characterized as amounting to more than the giving of "a cold shoulder" to a member of a Board of Directors, if it be true, as proof of *actual fraud.*

The Court must be impressed with the seriousness of the consequences to Mr. Cutting if the decree in this case is affirmed only upon the strength of an implication to be drawn from the *supposition* that he has intended through an interval of four years to eventually evade the payment of an honest debt by the plea of the statute of limitations; and which indeed is a personal privilege that may be waived. On the oral argument we mentioned that in the situation in which he found himself when this suit was brought, it would be a badge of fraud, to attempt even to fortify his claim of good faith in the transaction of December 20, 1906, by taking up this note without there being changed conditions in the affairs of the company requiring it, other than the fact of the bringing of the suit. *There are occasions when honest men cannot afford to act under coercion.* The whole issue in this case revolves around the character of Mr. Cutting for honesty and integrity in his business transactions, and we are anxious to meet that issue fairly and squarely upon the full record in the case. We believe that if the testimony were evenly balanced the court would hesitate to decide against the fairness of the transaction of December 20, 1906, in the face of a reasonable showing that would seem to make it possible for men occupying the position

that Mayo, Wernse and General Hart have occupied toward The Monetary Trust Company from the date of its organization, to benefit by a decree in a case to the substantial extent the record shows that they will here; but where there is no proof of bad faith, or the actual fraudulent intent, necessary to satisfy the demands of the law, as is the case here, we have great confidence that this appeal will be entertained and that appropriate relief will be granted with reference to establishing the ownership of the 1175 shares of Land Company stock in Mr. Cutting.

There is in the custody of the clerk of this Court, three sets of all the documents, papers and exhibits referred to in our briefs as being contained in the record, but not printed in the transcript. We have thought that the originals would be reserved for the use of the judge residing in San Francisco, and that the photographic copies contained in the original statement of evidence filed in the Court below and brought up under an order of that Court, and the same matter in the form of photographic copies in the clerk's transcript filed in this Court could be conveniently sent to the two judges residing elsewhere. All of this matter is important inasmuch as it represents our purpose to manifest to this Court a desire to have it examine the record even more fully than it was presented by counsel in the court below. The minute book, books of account, stock certificate books from which we derive the larger part of our evidence of good faith and fair dealing on the part of Mr. Cutting, was introduced in evidence *en masse* in the Court

below and the particular points made here and in our opening brief, as being supported by evidence drawn from these quarters, were not called to the attention of the trial Court by the then counsel for Mr. Cutting.

Dated, San Francisco,
April 3, 1916.

Respectfully submitted,

JACOB M. BLAKE,
Solicitor for Appellant.